



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: JUNE 01, 2022

IN THE MATTER OF:

Appeal Board No. 621231

PRESENT: RANDALL T. DOUGLAS, MEMBER

In Appeal Board Nos. 621229, 621230 and 621231, the claimant appeals from the decisions of the Administrative Law Judge filed February 3, 2022, insofar as they sustained the initial determinations holding the claimant ineligible to receive benefits, effective March 30, 2020 to August 18, 2020, on the basis that the claimant was not totally unemployed; charging the claimant with an overpayment of \$1890.00 in benefits recoverable pursuant to Labor Law § 597

(4); charging the claimant with an overpayment of Federal Pandemic Unemployment Compensation of \$2400.00 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020; and reducing the claimant's right to receive future benefits by 49 effective days and charging a civil penalty of \$283.50 on the basis that the claimant made willful misrepresentations to obtain benefits.

In Appeal Board Nos. 621232, 621233 and 621234, the claimant appeals from the decisions of the Administrative Law Judge filed February 3, 2022, insofar as they sustained the initial determinations holding the claimant ineligible to receive benefits, effective July 1, 2020 to August 21, 2020, on the basis that the claimant was not available for employment; charging the claimant with an overpayment of \$1260.00 in benefits recoverable pursuant to Labor Law § 597

(4); charging the claimant with an overpayment of Federal Pandemic Unemployment Compensation of \$1200.00 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020; charging the claimant with an overpayment of Lost Wages Assistance benefits of \$600.00 recoverable pursuant to 44 CFR Sec. 206.120 (f)(5); and

reducing the claimant's right to receive future benefits by 32 effective days and charging a civil penalty of \$189.00 on the basis that the claimant made willful misrepresentations to obtain benefits.

In Appeal Board Nos. 621235 and 621236, the claimant appeals from the decisions of the Administrative Law Judge filed February 3, 2022, insofar as they sustained the initial determinations disqualifying the claimant from receiving benefits, effective September 25, 2020, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by ASSOCIATES PLLC prior to September 25, 2020, cannot be used toward the establishment of a claim for benefits; charging the claimant with an overpayment of Federal Pandemic Unemployment Compensation of \$3,600.00 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020; and charging the claimant with an overpayment of Pandemic Emergency Unemployment Compensation of \$2898.00 recoverable pursuant to Section 2107 (e)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020.

At the combined telephone conference hearings before the Administrative Law Judge, all parties were accorded a full opportunity to be heard and testimony was taken. There were appearances by the claimant and on behalf of the employer and the Commissioner of Labor.

Based on the record and testimony in this case, the Board makes the following

**FINDINGS OF FACT:** The claimant worked as a phlebotomist for a medical office, from April 2017 until September 23, 2020. She worked a part-time schedule from 7:30 am until 1:00 pm until early April 2020. At that time the employer decided to furlough staff every other week, staggering the number of staff members in the office. The claimant filed a claim for benefits on April 10, 2020, which was backdated to March 23, 2020. At the time she filed her claim for benefits the claimant was experiencing difficulties with the Department of Labor's (Department) internet system and was unable to certify for benefits for that period.

The claimant worked the week ending April 5, 2020; she was furloughed the week of April 6 until April 10, 2020. The claimant worked the week ending April 19, 2020; the week ending May 3, 2020; and the week ending May 17, 2020. She was called into work on June 2, 2020.

The claimant was contacted by the Department on June 4, 2020, and a representative filled out a certification form for the weeks ending April 12 to May 17, 2020. The representative noted that the claimant did not work the weeks ending April 12, 26 and May 10, 2020. It was reported that the claimant worked five days in the weeks ending April 19, 2020, and May 3, 2020, and three days for the week ending May 17, 2020. There was no certification document for the week ending April 5, 2020. On June 12, 2020, an attestation form was filed in the claimant's name which indicated that for the weeks ending April 4, 2020, April 12, 2020, and May 3, 2020, that the claimant was eligible for benefits. A certification was filed by the claimant for the week ending June 7, 2020, which encompassed June 2, 2020, which indicated that the claimant worked 0 days in that week.

As a result of these certifications the claimant was paid \$1890.00 in regular benefits and \$2400.00 in federal benefits.

The employer would call staff to work as needed on days when they were furloughed. The employer ended the furlough for the claimant in July 2020. During this period, when the claimant was not working as a phlebotomist she would act as a greeter for the practice.

The claimant was scheduled to work the week ending July 3, 2020. The claimant worked on June 29 and 30, but called off work July 1 and 2, 2020. She used July 3, 2020, as her holiday. When she certified for benefits for the week ending July 5, 2020, she indicated that she worked 2 days and there were no days when she was not ready willing and able to work. The claimant took an unpaid vacation from July 6 to July 10, 2020. The claimant did not advise the employer that she would work that week as the employer would have put her on the schedule since they had lost one employee and were calling back all staff to work. The claimant certified that there was no day from July 6 to July 10, 2020, when she was not ready, willing, or able to work. The claimant was scheduled to work the week of July 27 until July 31, 2020. She worked July 27; called off sick on July 28, 29 and 30; and returned to work on July 31, 2020, when she was medically released to work. When she certified for the week ending August 2, 2020, she indicated that she worked 2 days, and there was no day when she was not ready, willing, or able to work. The claimant was scheduled to work the week of August 17, 2020, to August 21, 2020. The claimant worked August 17 and August 18, 2020, and then called off sick on August 19 to August 21, 2020. She certified to working 2 days during that

week, and that she was ready, willing, and able to work the remainder of the weekdays.

The claimant received \$1260.00 in regular benefits, and \$1200 and \$600, in federal benefits during this period.

When the employer noticed that they were being charged for days when the claimant made herself unavailable or was on vacation, they called her to the office and questioned her. The claimant produced screen shots of schedules that she was on furlough during some of the times she claimed benefits. The employer discharged the claimant for dishonesty and ethics violations on September 25, 2020.

The claimant received federal benefits in the amount of \$3600 and \$2898 thereafter.

OPINION: The credible evidence establishes that the claimant was not totally unemployed because she worked five days in the week of April 6 until April 10, 2020; during the week ending April 19, 2020; during the week ending; during the week of May 3, 2020; and during the week ending May 17, 2020; and that she worked June 2, 2020. The claimant admits to working these days.

However, with respect to her alleged willfully and factually false certifications for these weeks, we credit that the claimant was unable to certify for herself prior to June 4, 2020, and that a Department of Labor representative filled out the certification forms for the weeks ending April 12, 2020, to May 17, 2020. Those certifications indicate that the claimant worked during the weeks ending April 19, May 3, 2020, and May 17, 2020. We also credit that the claimant did not complete or submit the June 12, 2020, document which states that the claimant was eligible for benefits for the period April 4, 19, and May 3, 2020. This form contradicts the certification form submitted for the claimant a week earlier. We do not credit that the claimant would state she was working, and then that she was not working and eligible for benefits for the same weeks. There is no explanation as to why the claimant would be asked to complete the June 12, 2020, form, after the June 6, 2020, form was completed and submitted. The Department representative notes that the June 12 form was not a form a part-time worker, such as claimant, would file. The Department offers no reason for releasing the benefits at issue in light of the contradictions on the two forms completed by their representatives.

As there is no evidence that the claimant, herself, filled out the forms, or withheld the information that she worked during the week when she was not furloughed from April 4, 2020, until May 17, 2020, we conclude that there were no factually or willfully false statements made by the claimant and no penalty of future benefit days or civil penalty due for this period. Though the regular benefits she received for the period from April 4, 2020, until May 17, 2020, was an overpayment, that overpayment of regular benefits is not recoverable. However, as the claimant was not totally unemployed during this time, the federal benefits she received are repayable by law.

With respect to the claimant's certification for the week ending June 7, 2020, the claimant admits that she did work on June 2, 2020. Her certification that she worked no days in the week ending June 7, 2020, is both willfully and factually false. The penalty of future benefit days and the civil penalty were properly imposed. The overpayment of one day of benefits is recoverable as are the federal benefits received for this day of work.

The credible evidence establishes that the claimant was not ready, willing, or able to work July 1, July 2, July 28, 29, 30, August 19, 20 and 21, 2020. We credit that the claimant was scheduled to work the days in question and that she notified the employer that she was unable to work on those days and that she called off schedule because she was sick. As she was unable to work the employment for which she was scheduled, she was not ready, willing, or able to work at any employment. She was therefore not eligible for benefits for those days. Her failure to certify that she was not ready, willing, or able to work was both a willful and factually false statement and the penalties were properly imposed. Further as her statements were factually false the regular benefits, she received for these days are recoverable. The federal benefits are recoverable by law.

With respect to the period July 6 to July 10, 2020, we credit the employer's testimony that the claimant did not advise the employer that she could work on those days. As the employer was calling all employees back to work and at the same time losing an employee, we find it reasonable that work was available for claimant had she asked for it. Additionally, we don't credit the claimant's testimony that she was on furlough, and therefore wouldn't work, as the claimant knew and admitted that the employer had called employees back for day-to-day work during the furlough period. Therefore, the claimant advising the employer that she couldn't work due to sickness or vacation, made her

unavailable to be called to work by her own action. We conclude that the claimant was unavailable July 6 to July 10, 2020, and her representation that she was ready, willing, and able to work was willfully and factually false. The penalties were properly imposed and the overpayment of regular and federal benefits for this period are recoverable.

The credible evidence further establishes that the claimant certified for benefits when she had made herself unavailable for work with her employer by calling in sick or taking vacation. The Board has held that providing inaccurate and untrue information to the Department of Labor regarding work and earnings when certifying for benefits and collecting benefits when one is working, or could work, as in this case, constitutes misconduct for unemployment insurance purposes. (Appeal Board Nos. 618682 and 543157) The claimant falsely certifying that she was ready, willing, and able to work for the purpose of collecting benefits, when she had notified the employer that she wasn't available or able to work, called into question the claimant's integrity. Her actions caused the employer to be charged by the Department for an employee who should not have collected benefits, and financially harmed the employer. Under these circumstances we conclude that the claimant is disqualified from receipt of benefits effective September 25, 2020. Though the claimant initially contended that she did not receive the benefits at issue, she did concede that she did not check her records and would pay back the benefits she owes. We therefore conclude that the federal benefits the claimant received after September 25, 2020, are recoverable.

DECISION: In Appeal Board No. 621229, the decision of the Administrative Law Judge is affirmed.

In Appeal Board Nos. 621230 and 621231, the decisions of the Administrative Law Judge are modified accordingly, and as modified are affirmed in part and reversed in part.

In Appeal Board Nos. 621232, 621233 and 621234, the decisions of the Administrative Law Judge are affirmed.

In Appeal Board No. 621235 and 621236, the decisions of the Administrative Law Judge are affirmed.

In Appeal Board No. 621229, the initial determination holding the claimant ineligible to receive benefits, effective March 30, 2020, to August 18, 2020,

on the basis that the claimant was not totally unemployed, is sustained.

In Appeal Board Nos. 621230 and 621231, the initial determinations charging the claimant with an overpayment of \$1890.00 in benefits recoverable pursuant to Labor Law § 597 (4); charging the claimant with an overpayment of Federal

Pandemic Unemployment Compensation of \$2400.00 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020; and reducing the claimant's right to receive future benefits by 49 effective days and charging a civil penalty of \$283.50 on the basis that the claimant made willful misrepresentations to obtain benefits, are modified accordingly, and as modified sustained.

In Appeal Board Nos. 621230 and 621231, the amounts of recoverable overpayments and penalty days, as well as the civil penalty, are referred back to the Department for recalculation in accordance with this decision.

In Appeal Board Nos. 621232, 621233 and 621234, the initial determinations holding the claimant ineligible to receive benefits, effective July 1, 2020 to August 21, 2020, on the basis that the claimant was not available for employment; charging the claimant with an overpayment of \$1260.00 in benefits recoverable pursuant to Labor Law § 597 (4); charging the claimant with an

overpayment of Federal Pandemic Unemployment Compensation of \$1200.00 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020; charging the claimant with an overpayment of Lost Wages Assistance benefits of \$600.00 recoverable pursuant to 44 CFR Sec. 206.120 (f)(5); and reducing the claimant's right to receive future benefits by 32 effective days and charging a civil penalty of \$189.00 on the basis that the claimant made willful misrepresentations to obtain benefits, are sustained.

In Appeal Board Nos. 621235 and 621236, the initial determinations disqualifying the claimant from receiving benefits, effective September 25, 2020, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to September 25, 2020, cannot be used toward the establishment of a claim for benefits; charging the claimant with an overpayment of Federal Pandemic Unemployment Compensation of \$3,600.00 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid,

Relief and Economic Security (CARES) Act of 2020; and charging the claimant with an overpayment of Pandemic Emergency Unemployment Compensation of \$2898.00 recoverable pursuant to Section 2107 (e)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, are sustained.

The claimant is denied benefits with respect to the issues decided herein.

RANDALL T. DOUGLAS, MEMBER